

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4091

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

COLUMBIA CORRUGATED CONTAINER CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-4090

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

COLUMBIA CORRUGATED CONTAINER CORP.,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reemploy employee John Stallworth because of his union and protected concerted activity.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Board Act, as amended (61 Stat. 136, 73 Stat 519, 88 Stat.

395, 29 U.S.C. Sec. 151, et. seq.), for enforcement of its order (A. 257, 245-248)^{1/} issued against Columbia Corrugated Container Corp. (herein the "Company") on September 27, 1976, and reported at 226 NLRB No. 31. This Court has jurisdiction, the unfair labor practice having occurred in Syossett, New York, where the Company manufactures corrugated shipping containers, displays and related products.

I. THE BOARD'S FINDINGS OF FACT

Brierly, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging and refusing reemployment to John Stallworth because he gave Company President Charles Serwitz "a hard time" by not agreeing to waive the provision of the collective bargaining agreement governing layoffs. The facts underlying the Board finding are as follows:

A. Background

The Company and the Union^{2/} have had a collective bargaining relationship for a period of 20 years (A. 235). Their most recent collective bargaining agreement, effective September 1, 1974 to September 15, 1977, contains the following provision in Article VII (A. 235; 255):

When it becomes necessary to lay-off any employee due to slack of business, the Company shall confer with the shop delegate in order to attempt to share the available working time as equally as

^{1/} "A." references are to the printed Appendix. References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

^{2/} The Folding Box, Corrugated Box and Display Workers Local 381, United Paper Workers International Union, AFL-CIO, is herein called "the Union."

practicable among the employees in the same job classification working for the Company at least 1 year prior to any such layoff. Should a layoff due to slack of business continue beyond 30 days, then permanent layoffs shall be based on seniority. No permanent layoff, or layoff of a week or more, shall be made without 3 working days' prior notice to the affected employee, if the affected employee has had one year or more of service.

Without regard to the amount of work available, the Company also has had a longstanding practice of shutting down the plant twice each year, once during the winter and once during the summer (A. 235; 27).

B. Events in the Fall of 1974

In October, 1974, the Company announced that its plant would be closed from December 22 through January 5, 1975, for the annual year-end shutdown (A. 235; 28, 129, 259). Shortly thereafter, the Company instituted an economic layoff program, and by the end of November, all employees without tenure--that is, employees with less than one year seniority--had been laid off (A. 235-236; 49, 129-130). In early December, Company President Charles Serwitz determined that additional layoffs would have to be made and selected a group of 25 of the Company's least senior tenured employees for indefinite layoff (A. 235-236; 49, 129-130). To meet the contract's work-sharing requirements, the Company devised a plan which called for the formation of a second group of 25 employees and which also called for the two groups to work alternate weeks for a four week period beginning on December 16.^{3/} The second group

^{3/} Approximately another 25 employees were unaffected by the Company's plan.

was scheduled to work the first and third weeks, and the first group, the one marked for indefinite layoff, was scheduled to work the second and fourth weeks. However, because of the intervening year-end shutdown, the employees in the first group would only realize an additional week's work to begin on January 6, from the Company's ". . . attempt to share the . . . [work] as equally as practicable among the employees . . . for 30 days" (A. 235-236; 133-134, 258).

News of the proposed layoff and Company work-sharing plan was disseminated, and Night Shop Steward R. L. Ridgeway approached Company President Charles Serwitz with an alternative proposal. Ridgeway suggested that the employees facing permanent layoff be permitted to forgo working the week of January 6 so that they could apply for unemployment insurance on December 13 (A. 236; 135). Serwitz replied that he was agreeable so long as the Union had no objection. Shortly thereafter, Serwitz telephoned the union hall and spoke to an official who expressed the Union's approval of Ridgeway's proposal with the qualification that "the men were the only ones who could waive that part of the contract calling for work-sharing" (A. 236; 136-137). Serwitz then prepared waiver forms which were distributed to the employees who were scheduled for layoff (A. 236; 136-137). The waiver form read as follows (A. 236):

To: Columbia Corrugated Container Corporation

Dear Sirs:

I have been advised that I am being laid off after work on Friday, December 13, 1974.

Please note that I wish to waive my rights as stated in Article VII of the labor agreement between Columbia Corrugated Container Corporation and the [Union]. Rather than share the work for the first 30 days, I am willing to remain on layoff until work is available and I can return.

Among the employees who were scheduled for layoff was John Stallworth whose seniority dated from January 10, 1972, but who had worked for the Company intermittently since 1965. On December 11, Stallworth was informed he was being laid off and was given one of the waiver forms by his immediate supervisor, Assistant Plant Manager Edward McCloud. Stallworth was asked to read and execute the form. (A. 234, 237; 25, 29.) Later that same day, Stallworth told McCloud that he did not intend to sign the waiver, and McCloud reported this fact to Company President Serwitz (A. 237; 29-31, 45-46, 162). Serwitz approached Stallworth at the latter's work station and tried to explain why it would be to Stallworth's advantage to sign the waiver and accept permanent layoff as of December 13, in order to qualify for earlier unemployment benefits (A. 237; 30-31, 54-55, 117, 137-138). Stallworth was unconvinced and replied that he could see no reason to waive any of his contractual rights. (Id.) Stallworth was demonstrably upset at the idea of being laid off, believing, as he told Serwitz, he should not be laid off because he was not the

least senior man in his department (A. 237; 50, 103, 139). Serwitz also became agitated and at one point said that if Stallworth refused to sign the waiver, he, Serwitz, would not know what to do with him inasmuch as every other employee in Stallworth's category had signed in order to receive earlier unemployment benefits (A. 237; 31, 47- 48, 55). Stallworth continued to refuse to sign the waiver protesting again that he did not want to be laid off. Serwitz told Stallworth that "if he didn't sign the waiver, he would return to work on January 6th for one week and . . . thereafter be on permanent layoff" (A. 237; 139). The conversation ended when Stallworth repeated that he wanted to work, and Serwitz walked away (A. 237; 139-141).

On December 13, Stallworth was given his pay envelope. Like the other employees who were scheduled for indefinite layoff, Stallworth's envelope contained a "layoff slip," his pay for that week and the prior week, as well as one week's vacation pay. The so-called "layoff slip" in no way indicated when Stallworth was to return to work; it was simply a means of identification to be used in applying for unemployment compensation (A. 237; 32-34, 216).

C. Stallworth's discharge and the Company's refusal to recall or or reinstate him.

Stallworth did not receive any further instructions, oral or written, and did not report for work during the week of January 6, 1975. Company President Serwitz sent Stallworth a letter dated January 8, which stated:

Following your layoff, you were to return to work on January 6, 1975. You did not return, nor have we heard from you for a period exceeding 72 hours. Company rules call for notification within 72 hours. We therefore assume that you have quit your job.

The rule referred to in the letter was "Article II" of the Company's rules and regulations; that rule provides that discharge "may result" from "an absence for more than a 48-hour period . . . without notifying the Company" (A. 235; 266-267).

Upon receipt of this letter, Stallworth went to the plant and asked Serwitz "why he was presumed to have quit" (A. 237; 145, 58, 60, 68). In reply, Serwitz stated, that "[you] failed to come to work on January 6, . . . as directed" (A. 239; 145-146). Nothing further was said by either Serwitz or Stallworth at this time (Id.).

On approximately March 1, 1975, business had improved sufficiently to warrant recalling a number of the individuals who had been laid off in December and January. Assistant Plant Manager McCloud instructed one of Stallworth's coworkers to notify Stallworth that he should report for work, and Stallworth did so on the following day (A. 240; 36, 38, 113, 115, 168, 194-195). When Stallworth went to punch in on the time clock, he found that his punch card was missing and asked McCloud where it was. McCloud told Stallworth to wait and, after speaking with Serwitz, informed Stallworth that he, McCloud, had made a "mistake" in calling him back (A. 240; 38, 163, 194-195). Stallworth asked how the "mistake" could have

had been made and was told to speak to "Charlie" (A. 240; 195). Stallworth later approached Serwitz and asked about his punch card (A. 240; 41, 148, 195-196). Serwitz then told Stallworth that since he had given Serwitz a hard time with regard to the refusal to sign the waiver form in December, he was no longer working for the Company (A. 240; 41, 105, 195-196).

II. THE BOARD'S CONCLUSION AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reemploy employee John Stallworth because of his union and protected concerted activity. The Board's order requires the Company to cease and desist from the unfair labor practice found and from "in any other manner" interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. (A. 245-246, 251). Affirmatively, the Board's order requires the Company to offer Stallworth reinstatement, to make him whole for any loss of pay suffered because of the Company's discrimination, and to post the appropriate notices (A. 245-247, 251).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTIONS 8(a)(3) AND (1) OF THE ACT BY DISCHARGING AND REFUSING TO REEMPLOY EMPLOYEE JOHN STALLWORTH

Section 7 of the Act guarantees to employees "the right . . . to engage in [union or] other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3)

and (1) of the Act implements this guarantee by prohibiting employer retaliation against employees who engage in such activities, including the day-to-day part of collective bargaining which gives substance to the terms embodied in union agreements. See for example, N.L.R.B. v. Bowman Transportation, Inc., 314 F. 2d 497, 498 (C.A. 5, 1963). Thus, it is now well settled that "the assertion of rights under a collective bargaining agreement cannot be a basis for discharge [because] the rights secured by such an agreement, though personal to each employee, are protected rights under Section 7 of the Act." N.L.R.B. v. Selwyn Shoe Mfg. Corp., 428 F. 2d 217, 221 (C.A. 8, 1970). Accord: N.L.R.B. v. Ben Pekin Corp., 452 F. 2d 205, 206-207 (C.A. 7, 1971); N.L.R.B. v. Lagenbacher, 398 F. 2d 459, 463-464 (C.A. 2, 1968) cert. denied, 393 U.S. 1049 (1969).

The primary question presented here is one of fact--that is, what was the Company's "actual motive" for discharging and refusing reemployment to employee John Stallworth. In resolving this question, the Board is entitled to rely on circumstantial as well as direct evidence, and its inference of unlawful motivation must stand where it is reasonable and supported by substantial evidence on the record as a whole. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951). Moreover, as this Court has long recognized, the ascertainment of an employer's motivation is within the province of the Board, whose determination "cannot lightly be overturned." United Aircraft Corp. v. N.L.R.B., 440 F. 2d 85 (C.A. 2, 1971). In other words, the Court "may not displace the Board's choice between two fairly conflicting views even though

the Court would justifiably have made a different choice had the matter been before it de novo." N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405 (1962). We submit that, pursuant to these principles, the Board's finding of discriminatory motive here is amply supported by both direct and circumstantial evidence and is, therefore, entitled to affirmance.

Thus, as shown in the statement, on Wednesday, December 11, 1974, Company Supervisor McCloud told Stallworth that he was being laid off as of the end of the week and presented him with the waiver-of-contractual-rights form which Stallworth refused to sign.^{4/} Later that day, Company President Serwitz and Stallworth engaged in an emotional conversation during which Serwitz tried to convince Stallworth that signing the waiver would work to Stallworth's economic advantage. He also pointed out that Stallworth was the only one in the group who was refusing to sign and, therefore, was creating an unnecessary administrative problem for Serwitz. Stallworth, nevertheless, remained adamant in his position. He told Serwitz that he could see no reason to waive any of his contractual rights and, further, that he questioned whether,

^{4/} The form, which is set out in full, supra, provided that the employee agreed to accept indefinite layoff as of December 13, 1974, and agreed to waive his rights under Article VII of the contract which included his right to share work for 30 days "as equally as practicable . . . with other employees." The Company's "plan" under this provision was to place the employees on indefinite layoff on December 13, and to have them return for one week's work on January 6. Insofar as appears on the record the first time Stallworth learned of the "plan" or indeed of the layoff was when McCloud approached him with the waiver form on December 11.

based upon his seniority, the Company could lay him off. The conversation ended with Serwitz angrily telling Stallworth that he was, in fact, going to be placed on layoff as of December 13, but that he should report for an additional week's work beginning January 6.

Three days later, on December 13, Stallworth received the same "layoff slip" that was being given to the other employees who were being placed on layoff. He did not, however, receive any further instructions from the Company with respect to reporting back to work and did not, in fact, report back until the Company began making recalls of laid off employees in early March 1975. At that time, Supervisor McCloud notified Stallworth that he was to report for work on the following day. However, when Stallworth reported as directed, neither he nor McCloud could find his punchcard, and McCloud was at a loss to explain its absence. McCloud went to speak to Serwitz and, upon his return, explained that Stallworth's recall had been a "mistake," referring Stallworth to Serwitz for further clarification. Serwitz then flatly told Stallworth, that since he had given Serwitz a "hard time before [he] left [and] didn't sign the forms, [he] no longer work[ed] for the Company" (A. 41). ^{5/}

^{5/} Before the Board, the Company argued that the Administrative Law Judge should have credited Serwitz' disclaimer that he ever made these statements to Stallworth because the latter's testimony had not been credited with respect to other matters upon which the two had differed. However, "nothing is more common in all kinds of judicial decisions than to believe some and not all of [a witness' testimony]." N.L.R.B. v. Universal Camera Corp., 179 F. 2d 749, 754 (C.A. 2, 1950) vacated and remanded on other grounds, 340 U.S. 474 (1951). In crediting Stallworth rather than Serwitz (Continued)

Considering all the surrounding circumstances, Serwitz' statement establishes beyond question that "[t]his is one of those rare cases in which there has been 'an outright confession of unlawful discrimination.'" N.L.R.B. v. Lagenbacher, 398 F. 2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049, quoting N.L.R.B. v. Ferguson, 257 F. 2d 88, 92 (C.A. 5, 1958).

Before the Board, the Company vigorously argued that Stallworth was discharged solely because he had violated a Company rule by failing to contact the Company within the first 48 hours of his absence on January 6. This contention must fall, however, in light of the credited evidence, discussed above, showing that Serwitz told Stallworth that he was discharged for giving Serwitz "a hard time" by not signing the waiver form.

However, even apart from the direct evidence of Serwitz' motive, it is apparent that the Company did not discharge Stallworth simply for his failure to comply with the Company rule covering notification following absence from work. To begin with, the rule itself did

5/ (Continued)

on this point, the Law Judge found that Serwitz' testimony concerning the events on March 3 or 4 was irresolute and contradictory and was in direct conflict with the testimony of McCloud that Serwitz had told him that Stallworth could return to work as a new employee (A. 240; 148-149, 163-164). Since Stallworth's testimony that Serwitz told him he was being denied reemployment because he had given Serwitz "a hard time [by not] sign[ing] the forms" is neither "hopelessly incredible on its face [nor] flatly contrary [to] a so-called 'law of nature,'" the Board's credibility resolution should not be disturbed on review. N.L.R.B. v. Columbia University, 541 F. 2d 922, 928 (C.A. 2, 1976), quoting N.L.R.B. v. Dinion Coal Co., 201 F. 2d 484, 490 (C.A. 2, 1952).

not require that the penalty of discharge be imposed; rather, it expressly made that penalty discretionary (A. 250; 266-267).^{6/} Stallworth's long, unblemished work history certainly did not indicate that the severe penalty of discharge was warranted. Nor, for that matter, did the facts surrounding Stallworth's failure to appear for work or notify the Company on January 6. Thus, Stallworth received oral notice from Serwitz on December 11 that he was to report to work on January 6. However, during this conversation, Serwitz made it plain that he preferred for Stallworth not to return to work, but to go on immediate layoff. Like the other 24 employees in his group, Stallworth received a "layoff slip" on December 13, with no indication that he was to return to work before going on layoff. When Stallworth did not appear on January 6, the Company made no attempt to contact him and determine whether he had mistakenly failed to appear. Rather, Serwitz waited until January 8 and wrote a letter to Stallworth informing him that he had violated the Company rule requiring notification as to absences. But even in the letter, Serwitz did not state that Stallworth was being discharged; rather he informed Stallworth that "[w]e therefore assume that you have quit your job." It was only when Stallworth contacted Serwitz after receiving the letter that Serwitz made it clear that Stallworth was being discharged.

^{6/} Compare this rule with the Company's rule concerning recidivist absenteeism which prescribes specific mandatory penalties (A. 267-268). Significantly, an employee's absenteeism will result in his discharge only after the imposition of a number of other, less severe penalties including warnings and layoffs.

Under all these circumstances, the Board properly determined that Stallworth's failure to comply with the Company rule was not the "real reason" the Company decided to fire him. In any event, even the most critical reading of the record establishes that the Company's harsh treatment of Stallworth was motivated at least in part by his confrontation with Serwitz on December 11 and his assertion of his rights under the collective bargaining agreement. And it is well settled "that a discharge motivated even partially by the employee's union activity is unlawful." N.L.R.B. v. Mileo, Inc., 388 F. 2d 133, 138 (C.A. 2, 1968); N.L.R.B. v. George J. Roberts & Sons, Inc., 451 F. 2d 941, 945 (C.A. 2, 1971).

Before the Board, the Company also contended that even if Stallworth had been discharged for asserting his right to "share work" under the collective bargaining agreement, his discharge was not unlawful because Stallworth was not engaging in "concerted activity" protected by Section 7 of the Act. This contention has been consistently rejected by this Court and other Courts of Appeals, which have recognized that a single employee demanding his rights under a collective bargaining agreement is actually engaging in conduct extension of the concerted activity that gave rise to the agreement. N.L.R.B. v. Interboro Contractors, 388 F. 2d 495, 499-500 (C.A. 2, 1967); N.L.R.B. v. Lagenbacher, supra; N.L.R.B. v. Ben Pekin Corp., supra; N.L.R.B. v. Selwyn Shoe Mfg. Co., supra; N.L.R.B. v. Tom Johnson, Inc., 378 F. 2d 342, 343-344 (C.A. 9, 1967).

The Company would distinguish the holdings of these cases on the ground that all of the other 24 employees in Stallworth's group designated for layoff had waived their right to "share work" under the union contract. The Company argues that the other employees' waiver of their rights under the contract somehow negated the concerted activity underlying the "share work" contract provisions. Initially, this argument must fail because it is established that an employee's attempts to enforce a contract partake of the concerted activity underlying the contract even if the employee's views do not happen to be shared by his fellow employees. N.L.R.B. v. Interboro Contractors, supra, 388 F. 2d at 500. Any other view would result in a "chilling effect" on the disinterested employees should they seek to exercise the same rights in the future.

In any event, the Company's argument is based upon an incorrect view of the facts in the present case. Neither the Union nor the Company's employees waived the "share work" provisions of the collective bargaining agreement here. Indeed, the Union specifically refused to waive the contract provision and told the Company that it would have to obtain written waivers for each affected employee waiving his individual rights under the contract. Thus, the 24 employees who signed waivers were doing no more than forgoing their individual interests under the "share work" provision; they were not attempting to displace the concerted activity which that provision embodied.

The Company's contention that Stallworth should be denied reinstatement because he knowingly falsified his testimony during the course of the unfair labor practice proceeding is also without merit. Initially, this contention must fail when considered in light of the established doctrine that the remedial power of the Board under Section 10(c) of the Act to order reinstatement of an unlawfully discharged employee, with backpay, is "a broad discretionary one, subject to limited judicial review." Fibreboard Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964); N.L.R.B. v. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969). Where, as here, an employer challenges such an order on the ground that the discriminatee is disqualified from reinstatement because of misconduct, "the issue is not whether the [alleged misconduct] would be grounds for discharge . . . but whether the misconduct is sufficiently serious that an employee wrongfully discharged is to be denied the otherwise appropriate remedy of reinstatement." N.L.R.B. v. Yazoo Valley Electric Power Ass'n, 405 F. 2d 479, 480 (C.A. 5, 1968).

Here, the only "misconduct" attributable to Stallworth is the fact that one portion of his testimony--his denial of receiving any instruction from the Company to return to work on January 6--was discredited by the Administrative Law Judge. As the cases cited supra at note 5 show, the discrediting of a portion of a discriminatee's testimony does not necessitate that the discriminatee be denied reinstatement.

To be sure, the Board may deny reinstatement to an employee where it is shown that he has committed perjury during an unfair labor practice proceeding. Big Three Industrial Gas & Equipment Co., 212 NLRB 800, 803-804 (1974), enf'd, 512 F. 2d 1404 (C.A. 5, 1975)(employee subject to discharge only if his testimony is perjurious; employer has burden of showing perjury).^{7/} However, "false testimony which is the result of an honest mistake or inadvertence does not constitute perjury." Masina v. United States, 296 F. 2d 871, 877 (C.A. 8, 1961). "[I]n order to constitute perjury, a false statement must be made with criminal intent, that is, with intent to deceive, and must be willfully, deliberately, knowingly and corruptly false." Beckanstin v. United States, 232 F. 2d 1, 4 (C.A. 5, 1956).

^{7/} See also, N.L.R.B. v. Syracuse Stamping Co., 208 F. 2d 77, 79-80 (C.A. 2, 1953)(discharge for filing meritless charge held illegal); Northwestern Mutual Fire Assn., 46 NLRB 825, 848-851 (1943), enf'd., 142 F. 2d 866, 868-869 (C.A. 9, 1944), cert. denied, 323 U.S. 726 (illegally discharged employee who testified falsely and later corrected his testimony held not to have forfeited "the protection which the Act otherwise affords him"); Zenith Plastics Co., 190 NLRB 735, 738 (1971), enf., 455 F. 2d 520 (C.A. 6, 1972)("no evidence that [discriminatee] deliberately falsified the allegations of the charge"); N.L.R.B. v. Eclipse Moulded Products Co., 126 F. 2d 576, 582 (C.A. 7, 1942); First National Bank of New Smyrna Beach, 204 NLRB 127, 134 (1973)(discriminatee "did not deliberately or maliciously give false testimony"); Cf. N.L.R.B. v. Brake Parts Co., 447 F. 2d 503, 511-515 (C.A. 7, 1971) (discharge of employee for giving deliberately false testimony held lawful); Iowa Beef Packers, Inc. v. N.L.R.B., 331 F. 2d 176, 184-185 (C.A. 8, 1964)(illegally discharged employee denied reinstatement because he deliberately falsified testimony).

The facts here do not establish that Stallworth's testimony denying receipt of any notification to return to work on January 6 constituted perjury. Certainly, the Administrative Law Judge made no finding that Stallworth had deliberately falsified his testimony. On the contrary, the Judge discredited Stallworth primarily because he found his testimony "to be somewhat contradictory and confusing" (A. 239-240), the very reasons that he discredited Serwitz' version of his conversation with Stallworth on March 3 or ^{8/}

A reading of Serwitz' credited testimony concerning his instructions to Stallworth in their conversation of December 11 demonstrates that Stallworth may very well not have understood that Serwitz had given him a definitive instruction to return to work on January 6. Thus, in the course of their heated conversation, with Stallworth insisting that he wanted to, and had a right to, continue working, Serwitz pushed Stallworth to sign the waiver form:

I repeated to Stallworth that the waiver was not giving up any of his rights, that it merely eliminated that one clause of the contract which called for work sharing and that if he didn't sign the waiver, he would return to work on January 6th for one week and consequently thereafter be on permanent layoff (A. 139-140).

8/ Before the Board, the Company's argument that Stallworth had knowingly falsified his testimony was based in large part upon the testimony of the Union Vice-President Dantera to the effect that Stallworth had admitted him in late January of 1975 that Serwitz had told him to come back to work on January 6, but "that if it was a matter of bringing it out, that he [Stallworth] would deny that [Serwitz] ever said it" (Tr. 185-186). However, this aspect of Dantera's testimony was neither credited nor discredited by the Administrative Law Judge and was specifically denied by Stallworth (A. 240; 196-197).

In response, Stallworth--according to Serwitz' own testimony--merely reiterated that "he wanted to work" (A. 140). Serwitz made no response; he merely walked away (A. 140). Thus, even under Serwitz' version of his "notification" to Stallworth, there is nothing to indicate that Stallworth himself recognized that he had been instructed to return to work on January 6. Accordingly, Stallworth's later testimony that he had not received notification could well have resulted from a failure to perceive the meaning of Serwitz' instructions. In any event, there is nothing to indicate that Stallworth's testimony constituted perjury, and to deny him reinstatement based upon the adverse credibility determination here could result in the ironic situation in which the Company, having been found to have violated the Act based in part upon discredited testimony its president, escapes liability entirely. There is no precedent for such a result.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that a judgment should be entered enforcing the Board's order in full.

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June 1977

NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

v. : No. 77-4091

COLUMBIA CORRUGATED CONTAINER, CORP., :

Respondent. :

The undersigned hereby certifies that a copy of the Board's brief, in the above-captioned case, has this day been served by first class mail upon counsel for respondent as listed below:

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Dated at Washington, D. C.
this 20th day of June, 1977.